Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Friendly Fuld Neighborhood Center, Inc.
Docket No. A-07-79
Decision No. 2121

DATE: October 17, 2007

DECISION

Friendly Fuld Neighborhood Center, Inc. (Friendly Fuld) appealed the March 14, 2007 decision of the Administration for Children and Families (ACF) to terminate Friendly Fuld's Head Start grant. ACF based the termination on its finding that Friendly Fuld "failed to timely correct the findings determined to constitute deficiencies" in a monitoring review conducted in April 2005. FF Ex. A, ACF letter of March 14, 2007, at 1.

For the reasons explained below, we conclude that, while Friendly Fuld rebutted some of the review findings, Friendly Fuld failed to meet its burden to prove that it fully corrected three deficiencies. Accordingly, we uphold ACF's decision to terminate Friendly Fuld's Head Start grant.

Legal Background

Head Start is a national program that provides comprehensive child development services. 42 U.S.C. § 9831; 57 Fed. Reg. 46,718 (October 9, 1992). The program serves primarily low-income children, ages three to five, and their families. Id. The Department of Health and Human Services (HHS), through ACF, awards grants to community-based organizations that assume responsibility for delivering Head Start services — including education, nutrition, health, and social services — to their communities. Id.

To ensure that eligible children and their families receive high quality services responsive to their needs, Head Start grantees must comply with the Head Start Program Performance Standards codified in 45 C.F.R. Part 1304. Head Start Performance Standards (final rule), 61 Fed. Reg. 57,186 (Nov. 5, 1996). These performance standards cover the entire range of Head Start services and constitute the minimum requirements that a Head Start grantee must meet in three areas: Early Childhood Development and Health Services; Family and Community Partnerships; and Program Design and Management.

A grantee's noncompliance with a program performance standard or other Head Start requirement constitutes a "deficiency" if it meets one of the definitions of that term in 45 C.F.R. § 1304.3(a)(6). ACF cited Friendly Fuld as deficient under section 1304.3(a)(6)(i)(C) - "[a] failure to perform substantially the requirements related to the Early Childhood Development and Human Services, Family and Community Partnerships, or Program Design and Management." FF Ex. A, ACF letter of October 26, 2005, at 1.[1]

The Secretary is required to conduct a periodic review of each Head Start grantee at least once every three years. 42 U.S.C. § 9836a(c)(1)(A). If, as a result of a review, the Secretary finds a grantee to have a deficiency, he requires the grantee to correct the deficiency immediately, or within ninety days, or pursuant to a Quality Improvement Plan. 42 U.S.C. § 9836A(d)(1)(B)(ii).

Section 1303.14(b)(4) of 45 C.F.R. provides for ACF to terminate funding if a grantee "has failed to timely correct one or more deficiencies as defined in 45 C.F.R. Part 1304." This is one of nine grounds for termination set out in section 1303.14(b), which states that "[f]inancial assistance may be terminated for any or all of [these] reasons." ACF cited section 1303.14(b)(4) as the basis for this termination. FF Ex. A, ACF letter of March 14, 2007, at 1. To correct a deficiency, the grantee must fully comply with the performance standard at issue. Philadelphia Housing Authority, DAB No. 1977, at 11 (2005), aff'd Philadelphia Housing Authority v. Leavitt, No. 05-2390, 2006 WL 2990391 (E.D.Pa. Oct 17, 2006).[2] A single uncorrected deficiency is

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[1] ACF also cited Friendly Fuld as deficient under section 1304.3(a)(6)(i)(A), which involves threats to the health and safety of children. ACF required Friendly Fuld to correct these deficiencies within 30 days. FF Ex. A, ACF letter of October 28, 2005, at 2.

[2] In Philadelphia, the grantee argued that, to "correct a deficiency," it was not required to demonstrate that it fully complied with the program requirement, but only that it substantially performed that requirement. (Friendly Fuld did not (continued...)

sufficient to warrant termination of funding. 45 C.F.R. § 1303.14(b)(4) (authorizing termination for failure to correct "one or more deficiencies"); The Human Development Corporation of Metropolitan St. Louis, DAB No. 1703, at 2 (1999).

The burdens of proof applicable to Head Start grant terminations are well-settled. ACF must make a *prima facie* showing (that is, proffer evidence sufficient to support a decision in its favor absent contrary evidence) that it has a basis for termination under the relevant regulatory standards. First State Community Action Agency, Inc., DAB No. 1877, at 9 (2003); Rural Day Care Association of Northeastern North Carolina, DAB No. 1489, at 8, 16 (1994), aff'd No. 2:94-CV-40-BO (E.D.N.C. Dec. 19, 1995). If ACF makes this *prima facie* showing, the grantee must demonstrate by a preponderance of the evidence that it is in compliance with program standards.

> A grantee always bears the burden to demonstrate that it has operated its federally funded program in compliance with the terms and conditions of its grant and the applicable regulations. Moreover, a grantee is clearly

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[2](...continued)
make this argument in this case.) Pursuant to the following considerations, the Board rejected the grantee's argument. While one part of the definition of a deficiency (42 C.F.R. § 1304.3(a)(6)(i)(C)) sets forth substantial performance as the applicable standard for an initial finding of a deficiency in the listed areas, that definition does not address the standard for correction of an identified deficiency in any area that is set forth as a basis for termination. Specifically, the provision at 45 C.F.R. § 1304.60(f) that requires correction of identified deficiencies does not incorporate a substantial performance standard; nor is there any mention of substantial performance in the termination provision for failure to timely correct deficiencies at 45 C.F.R. § 1303.14(b)(4). Furthermore, ACF's interpretation is reasonable since permitting grantees to only partially correct a deficiency to avoid termination would effectively result in grantees never fully complying with Head Start requirements. Finally, under sections 1304.3(a)(iii) and 1304.61, ACF may require a grantee to come into full compliance in order to correct noncompliance that does not constitute a deficiency unless uncorrected. It is logical to read the regulations to accord ACF the same authority to require full compliance to correct a deficiency, which represents a significant failing, that is available for uncorrected noncompliance. The court agreed with the Board's reasoning.

> in a better position to establish that it did comply with applicable requirements than ACF is to establish that it did not. Therefore, the Board has held that the ultimate burden of persuasion is on the grantee to show that it was in compliance with program standards.

DOP Consolidated Human Services Agency, Inc., DAB No. 1689, at 6-7 (1999) (citations omitted); Rural Day Care, DAB No. 1489, at 8, 16; see also 45 C.F.R. § 74.21(b)(2).

Background

The Head Start grantee, Friendly Fuld, is a non-profit agency located in Newark, New Jersey, that operates multiple programs, including a Head Start program, a day care center, a mentoring program, and a job readiness and referral program. FF Exs. J; K, at 1. Friendly Fuld is affiliated with the Community Agencies Corporation of New Jersey (CAC). Id. CAC was founded by Friendly Fuld and two other Newark nonprofits in 1986 to provide administrative support for their operations. FF Ex. K, at 2. CAC's mission is to provide "professional centralized management for non-profit corporations which fall within its charter" by "administer[ing] overall fiscal responsibilities for the component corporations, [and] set[ting] corporate policies as necessary to assure proper operation for effectiveness and control." FF Ex. K, at 3. Friendly Fuld and CAC share two common board officers (the Secretary and Treasurer) and three members at large. FF Ex. A, February review report at 26. CAC's Chief Financial Officer, Joseph Rothenberg, also fulfills that role for Friendly Fuld. Tr. at 102. Friendly Fuld Head Start and CAC have a "Management Agreement" pursuant to which CAC provides "management, financial and administrative services" to Friendly Fuld. ACF Exs. 3, 5.

From April 11, 2005 to April 15, 2005, ACF conducted a review of Friendly Fuld's Head Start program, using the Program Review Instrument for Systems Monitoring (PRISM review). ACF Ex. 20. By letter dated October 28, 2005, ACF notified Friendly Fuld that it had been designated as a grantee with deficiencies. FF Ex. A, letter of October 28, 2005. The letter and the attached report identified a number of areas of deficiency and prescribed periods of time for correcting the deficiencies in different categories. Id. at 2-4. Specifically, a "Time Frame for Compliance" of 30 days was set out for areas of noncompliance constituting a deficiency listed under heading A, and a "Time Frame for Compliance" of 90 days was set out for areas of noncompliance constituting a deficiency listed under heading B. Id. The letter did not specify a time frame for deficiencies listed under heading C but stated that they must be fully corrected pursuant to time frames in an approved Quality Improvement Plan (QIP).[3] The letter further stated:

> If your program continues to have uncorrected deficiencies beyond the specified timeframe(s), pursuant to Sec. 641A(d)(1)(C) of the Head Start Act, 42 U.S.C. 9836A(d)(1)(C), we will initiate proceedings to terminate your Head Start grant.

Id. at 5.

ACF conducted a follow-up review during the week of December 5, 2005 for those deficiencies identified under heading A and conducted another review on February 21, 2006 (February review) for the deficiencies identified under heading B. The February review findings are at issue here and relate to Friendly Fuld's cost allocation practices, internal controls, and fiscal monitoring.

On March 19, 2007, Friendly Fuld received a letter from ACF, with an attached Follow-up Head Start Review Report, informing Friendly Fuld that it had failed to timely correct "the findings determined to constitute deficiencies from the PRISM Monitoring Review conducted in April 2005." FF Ex. A, letter of March 14, 2007, at 1. The letter cited five regulatory requirements as unmet. The three requirements that remain at issue are found at 42 C.F.R. § 1304.51(i)(2); 42 C.F.R. § 1304.50(g)(2), and 2 C.F.R. Part 230, App. A, ¶ (A)(4)(a)(1) - (3) and (b).[4]

On April 19, 2007, Friendly Fuld filed an appeal before the Board. Friendly Fuld moved for summary disposition on the grounds that the deficiency findings on which ACF based the

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[3] Friendly Fuld timely submitted its QIP to ACF. FF Ex. B. By letter dated December 22, 2005, ACF acknowledged receipt of the QIP and approved the QIP as submitted. Id. All of the deficiencies addressed in the QIP were required to be corrected by November 2, 2006. Id.

[4] The March 2007 termination letter also alleged that Friendly Fuld had failed to fully correct the deficiencies under 45 C.F.R. §§ 1304.51(h)(1) and (h)(2). In its initial brief before the Board, ACF gave notice that it "hereby withdraws as a basis for termination the failure to correct these deficiencies." ACF Br. at 9; see also Ruling on Motion for Summary Disposition, dated June 27, 2007, at 9 (attached).

termination were invalid because of ACF delays in issuing its initial and follow-up review reports and because ACF improperly conducted its follow-up review prior to the time ACF gave to Friendly Fuld to correct its deficiencies. Friendly Fuld also argued that no hearing was necessary because Friendly Fuld's documentary evidence established that it timely corrected the deficiencies. After reviewing the parties' arguments and the record, the Board denied Friendly Fuld's motion. See Ruling on Motion for Summary Disposition dated June 27, 2007 (attached). On June 28, 2007, the Presiding Board Member issued a notice of hearing setting out preliminary conclusions as to arguments raised by Friendly Fuld about the relevance of certain reviewer findings "to assist the parties in focusing their presentations at the hearing." Summary of Conference Call and Notice of Hearing Pursuant to 45 C.F.R. § 1303.16(h), at 4.

Prior to the hearing, Friendly Fuld submitted an Appellant's Brief (FF Brief), a Reply (FF Reply), Exhibits A through K, A-1, and B-1, and witness affidavits from Dr. Regina Adesanya, the former President of the Friendly Fuld Board of Directors and the present President of the CAC Board of Directors; Terence J. Dwyer, Treasurer of the CAC Board of Directors; Dorothy J. Knauer, Executive Director of CAC; and Joseph L. Rothenberg, Chief Financial Officer of CAC. ACF submitted an Initial Submission and Opposition to Motion for Summary Disposition (ACF Response), an Additional Submission (ACF Additional Submission), Exhibits 1 through 23, and witness affidavits from Betty Ann Larkin, Head Start Program Specialist and February review Team Leader, and Sallie Birmingham, February review team member (ACF Financial Reviewer).

An oral hearing was conducted in Newark, New Jersey on July 31, 2007. The four Friendly Fuld witnesses and the two ACF witnesses testified. Both parties submitted post-hearing briefs.

Analysis

We make detailed findings below but set out first our general impressions of the testimony and evidence presented.

Through its testimony and other evidence Friendly Fuld undercuts some of the findings by the ACF Financial Reviewer on which ACF relies. Specifically, Friendly Fuld showed that, during some of the discussions between the ACF Financial Reviewer and Friendly Fuld officials, there may have been some confusion regarding the documents being discussed or their scope. Friendly Fuld also points out that the ACF Team Leader was relying for most of her testimony on what the ACF Financial Reviewer had told her. We do not rely on the ACF Team Leader's testimony to the extent it was purely derivative or on the Financial Reviewer's testimony that was based on mistaken impressions. Even if the ACF reviewers were not fully aware of all of the relevant information, however, Friendly Fuld had an opportunity to provide evidence to us and to explain fully what it had done to correct the deficiencies. Yet, Friendly Fuld did not even address some of the key review findings and did not adequately rebut other findings.

Friendly Fuld had the burden to show that it had fully corrected the deficiencies at issue within the 90-day period for correction, but did not meet that burden. The testimony Friendly Fuld presented about its practices for allocating costs, applying internal controls, and monitoring the program was for the most part general assertions of compliance given by top officials of Friendly Fuld. These witnesses did not explain the foundation for their assertions on key points and contradicted themselves in some respects. Their testimony was not supported by the documentation presented (and in some respects was inconsistent with that documentation). Some key review findings were not addressed by either the testimony or the documentary submissions. While the testimony of the CAC Executive Director and the Treasurer addressed some of the underlying concerns about Friendly Fuld's fiscal management by explaining the relationships between Friendly Fuld's Head Start program and its other programs and between Friendly Fuld and CAC, this testimony also raised questions about why other key officials (in particular, the Head Start Director and the Chief Financial Officer) were not fully informed regarding decisions on how costs were charged to the Head Start program, and about why Friendly Fuld's written procedures were not timely updated to reflect those relationships.

The Chief Financial Officer's testimony did not fully explain why he was unable during the February review to address the cost allocation issues raised, and his testimony was inconsistent in some respects, as discussed below. Friendly Fuld provided no evidence, moreover, to rebut the testimony of the ACF Team Leader that the Head Start Director referred her to CAC for financial matters and was unable to respond to basic questions concerning Head Start program finances. Yet, the key Head Start policies and procedures document which Friendly Fuld says it implemented makes the Head Start Director responsible for all operations including financial management. FF Ex. E, at 2.

Also, while Friendly Fuld asserts that it relied on its Fiscal Consultant to provide monitoring of fiscal issues, the monthly reports prepared by the Fiscal Consultant were based on general ledger information provided by the Chief Financial Officer. There is no evidence regarding what other activities the Fiscal Consultant in fact performed. Friendly Fuld faults the ACF Financial Reviewer for not asking specific questions of the Fiscal Consultant when she spoke with him during the review, but did not present the Fiscal Consultant as a witness to testify about what steps he may have taken (or advised Friendly Fuld to take) to address the fiscal deficiencies found in the PRISM review. Someone (although it is not clear who) did draft a new document setting out better internal controls than the previously adopted procedures which Friendly Fuld says were applied, but this draft document was not formally adopted within the 90-day correction period, and Friendly Fuld provides no explanation of why not. Overall, Friendly Fuld's evidence was not sufficient to provide adequate assurance that Head Start funds were being spent only for Head Start purposes.

Below, we set out the findings in the PRISM and follow-up review reports in their entirety, but focus our more detailed discussion on those findings that were unaddressed or, if addressed, unrebutted and which therefore support the termination.

1. *Alleged failure to correct a deficiency with respect to 2 C.F.R. Part 230.*

Office of Management and Budget Circular A-122 (OMB Circular A-122), codified at 2 C.F.R. Part 230, Appendix A, requires non-profit grantees like Friendly Fuld to charge to federal programs only costs that are allocable to that program and to allocate joint costs among benefitting activities.[5] Specifically, Appendix A, paragraph A.4. provides:

> 4. Allocable costs. a. A cost is allocable to a particular cost objective, such as a grant, contract, project, service, or other activity, **in accordance with the relative benefits received.** A cost is allocable to a Federal award if it is treated consistently with other costs incurred for the same purpose in like circumstances and if it:

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[5] OMB Circular A-122 is made applicable to nonprofit organizations that receive Head Start funds by 45 C.F.R. § 74.27(a). OMB A-122 provides a uniform set of cost principles for determining allowable costs of grants, contracts, and other agreements and is designed to promote efficiency and understanding between nonprofit grantees and the federal government.

(1) Is incurred specifically for the award.

(2) Benefits both the award and other work and can be distributed in reasonable proportion to the benefits received, or

(3) Is necessary to the overall operation of the organization, although a direct relationship to any particular cost objective cannot be shown.

b. Any cost allocable to a particular award or other cost objective under these principles may not be shifted to other Federal awards to overcome funding deficiencies, or to avoid restrictions imposed by law or by the terms of the award.

(Emphasis added.)

The PRISM report found:

> The grantee did not allocate costs as required by A-122, which required that only costs which benefit the program were charged to the program. A review of the expenditure reports (Abbott, Head Start, Child Care Wrap-around and USDA) for Jan. 05 - Mar. 05 and for the year ending 1/31/05, showed that space costs for both Head Start sites were charged 100% to the Head Start funding. The wraparound childcare program, USDA program, and the Abbott program, all used the same space. The CFO stated that the grantee did not allocate space costs.

FF Ex. A, February report, at 5 (citing the PRISM findings). The February 2006 follow-up review found that this deficiency was not corrected, stating:

> The grantee did not document that shared costs were allocated in accordance to relative benefits received as specified by this Part. A review of the Profit and Loss Detail report for February 2005 through January 2006 and financial statement for the period ended December 31, 2005, showed that no space costs were charged for one of the two Head Start sites and $31,640 was charged for the other site. The CFO confirmed during an interview that rent was charged to Head Start for only one of two Head Start sites. The CFO also confirmed that the $31,640 charged to Head Start for the period was for a facility shared with a non-Head Start child care program and

> Abbott; however, the CFO could not document how the rent for the space shared by the three programs had been allocated. The CFO provided a memo from the past Board Treasurer to the Executive Director dated January 13, 2005. The memo offered several cost allocation suggestions for shared space; however, no evidence was provided to document that any of the suggestions were used to allocate shared facility costs. In addition, the Profit and Loss Detail report showed that $21,418 for shared administrative overhead costs had been charged to the grant. The CFO stated that he did not have a cost allocation plan or any other documentation to support the allocation of shared costs charged to the grant.

Id. at 5-6.

It is undisputed that Friendly Fuld had four primary sources of funding for programs at the sites at issue: the Head Start program, two different Abbott programs, and a food program.[6] We refer to the two Abbott programs as the Abbott Enhancement program and the Abbott Wraparound program, although other terms are also used in the record to distinguish the two programs, and Friendly Fuld's testimony was not always clear on whether the witness was referring to both Abbott programs or only the Enhancement program.[7] The Abbott Enhancement funds were paid by

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[6] The source of the food program money is not clear. Friendly Fuld budget documents refer to the food program as the "NJ DOE Childcare Food Program." FF Ex. G, at 7. The president of the CAC Board referred to it as money from "USDA" - the United States Department of Agriculture. Adesanya Aff. at ¶ 14; Tr. at 98. It may be that USDA funds were administered by the New Jersey Department of Education. In briefing, ACF did not expressly rely on Friendly Fuld's handling of the food funding as a basis for the deficiency citations at issue, and we do not address it.

[7] The Abbott funds are unique to New Jersey and resulted from a series of New Jersey Supreme Court decisions. The Abbott litigation was filed on behalf of New Jersey children residing in economically disadvantaged communities to ensure that they receive constitutionally guaranteed educational services. Under the Abbott decisions, Abbott districts are eligible for additional resources to fund, among other educational services, pre-school programs for three and four year-old children. See (continued...)

the Newark Board of Education and provided enhanced services, such as additional and more qualified teachers to Head Start children ages three and four during the six-hour Head Start day. Tr. at 100, 111, 124, 126. Also, the Abbott Enhancement program required that there be only 15 Abbott children per classroom, so it required more space for Abbott children than Friendly Fuld's Head Start program had been providing. Tr. at 125-126; 132. The Abbott Wraparound funds were paid by the New Jersey Department of Human Services and provided the Head Start eligible children with services for an additional four hours a day during the Head Start program year and ten hours a day during the summer when the Head Start program was not in session. Tr. at 98-99, 100, 111. While the Abbott Wraparound program apparently served children who were also enrolled in Head Start, Friendly Fuld did not dispute the finding that this is a non-Head Start program.

Friendly Fuld presented evidence that it says shows that, contrary to the review finding, it did have a cost allocation plan for how to allocate shared costs. Friendly Fuld points to Exhibit E, the Friendly Fuld Neighborhood Centers, Inc. *Head Start Accounting Principles and Procedures*, Section 5. That document does set out allocation bases for specific categories of cost - in other words, it identifies the allocation <u>methods</u> Friendly Fuld planned to use for those costs. The ACF Financial Reviewer clarified in her testimony, however, that what she was looking for was documentation of how in fact Friendly Fuld determined the benefits to Head Start. Tr. at 48, 74-76. For example, Exhibit E says that facilities expenses will be allocated based on "usable square footage." Ex. E, at 11. The Reviewer was looking for documentation, therefore, that would show what square footage was used by each of the programs and what percentage this was of total square footage. She testified:

> Without documentation, it was not possible for me to determine the reasonableness of shared space and administrative overhead costs charged to the grant. The grantee could not document that shared costs were distributed to any activity based on relative benefits received. Without adequate documentation, the costs charged did not meet the requirements of the cost principles.

Birmingham Aff. at ¶ 30.

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[7](...continued)
Tr. at 124; http://www.state.nj.us/education/abbotts/about.

In its initial written appeal before the Board, Friendly Fuld cited the cost allocation standards set forth in the *Head Start Accounting Principles and Procedures* and asserted that "these policies have been faithfully applied when allocating shared costs for all times relevant to the April 2005 and February 2006 PRISM reviews." Appeal at unnumbered 8. The evidence does not support this assertion, however. We first explain why we reach this conclusion with respect to rent (and other facilities expenses) and then explain why we reach this conclusion with respect to administrative costs.

The Friendly Fuld Head Start program incurred space costs at two locations, referred to as the Carriage House and the St. Nicholas Church site. Friendly Fuld showed that, while the Head Start program paid part of the rent for the St. Nicholas Church site, Head Start was not charged rent for the Carriage House site during the year ended January 31, 2006. The record indicates, however, that "utilities" for the Carriage House were allocated to Head Start. <u>See</u>, <u>e.g.</u>, ACF Ex. 15, at 1 (post-it note from Dorothy Knauer to ACF reviewers); Tr. at 47.[8]

In any event, Friendly Fuld does not dispute that, for the Head Start budget period (February 1, 2005 - January 31, 2006), Friendly Fuld charged $31,640 for rent for the Nicholas site to Head Start funds. ACF Ex. 13, at 11-12. The record does not show the total rent paid during the budget period, but the total rent shown on the Profit and Loss Statement for calendar year 2005 was $48,000. FF Ex. G, Att. at 3. Friendly Fuld's "Income Statement by Project" for calendar year 2005 indicates that

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[8] Friendly Fuld focused on the fact that no rent was in fact charged for the Carriage House site for the period ending January 31, 2006, in order to show that the ACF Financial Reviewer's findings about the document the review report refers to as containing proposed allocation methods (ACF Exhibit 15) failed to take into account the fact that the proposed methods related only to the Carriage House site. Friendly Fuld says that it rejected charging any rent for the site to Head Start since the site was owned by CAC, a related organization. While we agree with Friendly Fuld that it could legitimately have rejected the proposed methodologies, what Friendly Fuld ignores is that, since it was charging utilities (and presumably other costs such as maintenance) related to the space at Carriage House (which was admittedly used for some non-Head Start purposes), Friendly Fuld was required to have and follow an equitable method for allocating those costs among the benefitting programs, even if it was not charging rent for the space.

Friendly Fuld charged rent costs of $25,620 to Head Start funds; $13,780 to Abbott Enhancement funds; and $8,600 to Abbott Wraparound funds. FF Ex. D. These amounts add up to $48,000.

Friendly Fuld's *Head Start Accounting Principles and Procedures* provide that "facilities expenses" will be "allocated based upon usable square footage." FF Ex. E, at 11. While Friendly Fuld initially stated that it applied this method to 2005 and 2006 costs, Friendly Fuld's testimony indicates otherwise. Both the Chief Financial Officer and CAC Executive Director testified that Friendly Fuld had actually determined what rent costs would be charged to Head Start and the Abbott programs based on guidance from Abbott as to what costs could be covered by Abbott. Knauer Aff. at ¶ 7; Rothenberg Aff. at ¶¶ 14-15. The Executive Director testified that this guidance was based on an agreement between "the region ACF people, the New Jersey Head Start folks, and the New Jersey Department of Education, and Human Services, too" as to costs eligible for Abbott reimbursement. Tr. at 131-132.[9] Neither witness testified as to their basis for stating that this guidance was followed, however, and Friendly Fuld presented no testimony from staff who were actually responsible for the accounting entries at issue.

Additionally, Friendly Fuld did not support its witnesses' general assertions with any documentation, such as actual calculations, Abbott agreements, or instructions from Abbott on what space costs Abbott would cover under the Enhancement program or the Wraparound program.[10] Therefore, it is impossible to

[9] The Executive Director also stated that this agreement was made prior to her tenure as Executive Director. Id. She did not explain how she knew about the agreement process and the terms of the agreement.

[10] Even assuming that Friendly Fuld did not retain a copy of the Abbott agreement, that would not explain Friendly Fuld's failure to produce the document, given that it should be available from other sources. Contrary to what Friendly Fuld argues, moreover, the alleged fact that ACF gave Friendly Fuld until November 2, 2006 to fully comply with requirements at section 1304.51(g) for maintenance of fiscal records does not preclude either ACF or the Board from relying on Friendly Fuld's inability to document how it allocated its joint costs among benefitting programs to support the termination. The corrective actions listed in the QIP were directed at ensuring that documents, including the "allocation of CAC costs," were (continued...)

determine whether Friendly Fuld properly charged rent costs to Head Start funds under this agreement between Abbott and Head Start.

Moreover, the testimony is unclear about whether the Abbott agreement addressed rent costs of the Abbott Wraparound program or only the added space needed for the Abbott Enhancement program, and whether the agreement assured that all of the costs allocable to the Abbott Wraparound program were paid by that program. Although her testimony on cross seemed to apply to both programs, the Executive Director's declaration refers only to an agreement with "Newark Schools Abbott enhanced Program." Knauer Aff. ¶ 7. Contrary to what Friendly Fuld argues, the mere fact that the children served by the Abbott programs may have also been also enrolled in Head Start does not mean that 100% of the facilities expenses were allocable to Head Start. The Wraparound program was clearly the "non-Head Start program" referred to in the review findings. It admittedly operated during different hours than Head Start and during summer months when Head Start was not in session. Thus, none of the additional space-related costs of the Wraparound program were of benefit to the Head Start program, so they could not be properly allocated to Head Start, even if Abbott funds from the New Jersey Department of Human Services were not available to cover them. Yet, we have no assurance on the record here that Head Start was not covering some costs that were of benefit to the Wraparound program, but not to Head Start.[11]

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[10](...continued)
"maintained at the Head Start location." ACF Ex. 1, at 9. This was in response to a finding that "[f]iscal records were not maintained in a manner that made them easily accessible and some critical documents could not be located." Id. Friendly Fuld provided no testimony that Friendly Fuld at one time had documents supporting its allocation of costs that just could not be located, however. Moreover, if Friendly Fuld did in fact consider the allocation methods in its *Head Start Accounting Policies and Procedures* to apply but simply could not document that it applied those methods to calculate allocation percentages, then it is reasonable to expect that, in order to correct the deficiency, Friendly Fuld would have done new calculations and at least be able to describe how the allocation percentages were determined.

[11] Indeed, the Profit and Loss statement for the period January through December 2005 suggests that the Head Start
(continued...)

Finally, Friendly Fuld did not timely amend the cost allocation section of its *Head Start Accounting Principles and Procedures* to reflect the fact that, as to rent, it was not determining allocability by calculating usable square footage, nor does Friendly Fuld claim it provided any other written guidance about rent charges to those responsible for charging and reviewing the costs. If Friendly Fuld officials knew that the rent costs would not be allocated among the programs using the methods specified in the *Head Start Accounting Principles and Procedures*, they should have taken timely steps to address this discrepancy. It is reasonable to infer that this failure contributed to the Chief Financial Officer's apparent inability to explain to the ACF Financial Reviewer the basis for the 2005-2006 allocation of rent costs to Head Start. See Birmingham Aff. at ¶¶ 15-16. Indeed, while the Chief Financial Officer testified before the Board that, in February 2006, he was aware of Friendly Fuld's allocation plan and was aware that the Abbott agreement "modified" the plan, he did not testify that he explained the plan or that modification to the ACF Financial Reviewer. See Rothenberg Aff. at ¶ 14. Given the fact that Friendly Fuld was faced with termination if it did not show that it had corrected this deficiency, he had every incentive to bring such critical information to the attention of the Fiscal Reviewer. Since he did not, we do not find credible his testimony that he was aware at the time of the February review of the cost allocation methods in the plan and the alleged Abbott agreement modification.

ACF also relies on its finding that the Chief Financial Officer and Fiscal Consultant could not explain the allocation basis for $21,418 charged to Head Start as administrative expenses. FF Ex. A, February review report at 6. As to the $21,418, the ACF reviewer testified that the Chief Financial Officer "stated that a cost allocation plan had not been developed to support these costs." Birmingham Aff. at ¶ 16. The Chief Financial Officer did not deny making this statement.

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[11] (...continued)
program may have been charged for some space-related costs that did not benefit it. For example, the statement shows that the entire $12,076.45 of costs in an account labeled "Gas & Electric" was charged to Head Start. FF Ex. G, at unnumbered pages 9 and 18. Yet, the Abbott Wraparound was operating at times when Head Start was not (including for some summer months), so some of these costs should have been allocated to that program, rather than to Head Start.

The $21,418 at issue relates to administrative costs incurred by Friendly Fuld directly. See ACF Ex. 13, at 33.[12] The Board's Ruling issued prior to submission of the affidavits and the oral hearing rejected Friendly Fuld's argument that, because the PRISM review did not specifically mention allocation of administrative costs, Friendly Fuld did not have to address this follow-up finding. The Ruling stated that "Friendly Fuld can reasonably be charged with notice that it could not correct the identified deficiency merely by having a cost allocation plan, but also had to ensure that Head Start is charged only for costs that are allocable to that program." Ruling at 6. After this Ruling was issued, however, Friendly Fuld did not even attempt to explain how it allocated $21,418 in administrative costs to Head Start. Instead, Friendly Fuld presented evidence about its basis for a different type of administrative costs, i.e., Friendly Fuld's payment to CAC for administrative services. Therefore, we conclude that Friendly Fuld failed to explain, must less to document, what its basis was for charging $21,418 in administrative costs to Head Start and how that basis relates to the allocation methods in its *Head Start Accounting Principles and Procedures* and the requirements of OMB Circular A-122.

On the whole, the record shows that key personnel at Friendly Fuld did not understand their responsibilities for ensuring that Head Start was charged only for costs that were allocable to Head Start. As discussed above, the Chief Financial Officer appeared to be unaware at the time of the review of any need to ensure that allocation bases fit the costs being incurred and to ensure that those responsible for actually allocating the costs understood what those bases were and applied them consistently. In fact, the ACF Financial Reviewer testified the Chief Financial Officer stated during the review that he had not been trained on Head Start standards and depended on the Head Start Director and the Friendly Fuld Fiscal Consultant (neither of whom testified) "to ensure compliance with all applicable Head Start regulations." Birmingham Aff. at ¶ 16. Finally, ACF's Team Leader for the review testified that the Head Start Director stated that "she was not exactly sure how the [fiscal area]

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[12] CAC charges Friendly Fuld for the administrative services it provides, including accounting, management, and other services; in addition, other administrative costs are incurred by Friendly Fuld for general administration. Tr. at 112-113; FF Ex. G, at unnumbered page 16 (identifying one account as administrative expense paid to CAC and another as administrative expense "intra"); ACF Ex. 13, at 33 (identifying the $21,418 as from the latter account).

deficiencies had been corrected, or what had been done because she had no input into finance." Larkin Aff. at ¶ 11. Friendly Fuld did not provide any testimony from the Chief Financial Officer or the Head Start Director denying that they made these statements.

Thus, we conclude that Friendly Fuld did not meet its burden to show that it had fully corrected its deficiency in meeting the requirements of 2 C.F.R. Part 230, Appendix A.

2. *Alleged failure to correct a deficiency with respect to establishing and implementing internal controls to safeguard federal funds (45 C.F.R. § 1304.50(g)(2))*

Section 1304.50(g)(2) provides:

> 1304.50(g) Governing body responsibilities.
> (2) Grantee and delegate agencies must ensure that appropriate internal controls are established and implemented to safeguard Federal funds in accordance with 45 CFR 1301.13.

The PRISM review report stated:

> The grantee had not established appropriate internal controls to safeguard federal funds. Review of financial detail reports identified many irregularities in the accounting for federal funds. Cost items were recorded under inappropriate expense accounts. Examples included: (1) food bills recorded under "Administrative Costs paid to C.A.C.", (2) office supplies recorded under fiscal consultant costs, and (3) office supplies posted to the employee life insurance expense account.
>
> A review of the allocations for salaries submitted by the Fiscal Consultant, compared to the allocations currently posted in the payroll system, showed 4 out of 31 allocations did not match the percentages, as designated by the Fiscal Consultant.
>
> A review of the expenditures made during the month of February 2005 showed that these expenditures were from the prior funding period beginning February 1, 2004 that had been expended in the current award period. For example: The agency posted nutrition services costs in March 2005 for invoices dated 12/30/04 (#1510) and 1/31/05 (#1511) for $500.00 and $400.00 with payments issued on 3/23/05, (#58323).

> Interviews with the CFO, Head Start Director and Fiscal Consultant confirmed that there were no internal controls in place to insure appropriate accounting and record keeping. The CFO said that expense codes were completed by the Head Start staff. The management contract stated that the CFO had the responsibility for accounting. The contract for the Fiscal Consultant did not include "internal control" or "recordkeeping" as a responsibility.

FF Ex. A, February report, at 16-17.

The follow-up February review report stated:

> The grantee did not ensure that appropriate internal controls were established and implemented to safeguard assets, to check the reliability of accounting data, and to promote operating efficiency in accordance with 45 CFR 1301.13.
>
> The governing body continued to have insufficient checks and balances to ensure only allowable costs were charged to the grant. Although the unallowable costs for food and wages identified by the triennial review had been reversed, a review of financial documents and interviews with the Fiscal Consultant revealed that unallowable costs for shared space and administrative overhead were charged to the grant. Based on a review of the Friendly Fuld Head Start Profit and Loss Detail report for the period February 2005 through January 2006, $31,640 for a facility shared with two other non-Head Start programs and $21,418 for shared administrative overhead costs were charged to the grant. The grantee could not provide documentation that these costs were allocated based on relative benefits received by the Head Start grant as required. The Board Treasurer stated that written procedures to determine allowability, allocability, and reasonableness of costs were in process and had not been implemented.
>
> The governing body did not establish and implement sufficient checks and balances to ensure the accuracy of accounting data and financial information. A review of the interim SF-269 Financial Status Report that was due 30 days after the end of the budget year ended January 31, 2006, showed no expenditures for non-Federal share for the entire year, no unliquidated obligations on line 10(k), and an unobligated balance of $31,000 that the

> Fiscal Consultant stated was inaccurate. There was no evidence to support that another staff person or governing board member checked the accuracy of the report or questioned the lack of non-Federal expenditures for the entire year prior to submitting the report to HHS.

Id. at 17.

We conclude that Friendly Fuld failed to prove that it fully corrected this deficiency.

The PRISM review found numerous problems with Friendly Fuld's establishing and implementing internal controls to safeguard federal funds, including cost items reported incorrectly, misallocation of salaries between funding sources, and lack of clarity between staff, the Chief Financial Officer, and the Fiscal Consultant as to accounting/recordkeeping responsibilities. Friendly Fuld proffered no credible evidence as to how its internal control system or the implementation of its system changed between the PRISM review and the February review. For example, while Friendly Fuld submitted Board and Policy Council minutes, the minutes did not indicate that either body reviewed or approved measures to address this deficiency. See FF Exs. G, H, I. Also, while the Chief Financial Officer referred to "internal controls" put in place in 2005 after he joined CAC in January 2005 (Rothenberg Aff. at ¶ 3), he did not describe these controls or testify that they were put in place after the April 2005 PRISM review or in response to the findings in the PRISM review report. See Tr. at 108.

Additionally, the testimony of the Friendly Fuld witnesses showed continuing confusion about internal controls. For example, the Chief Financial Officer testified that expenditures were approved by the Head Start Director and then by him (Tr. at 108), but the CAC Executive Director testified that checks requests were approved by the Head Start Director and then the Deputy Executive Director (Tr. at 127-128). Also, the Treasurer testified that CAC, by the time of the follow-up review, had implemented new policies and procedures (even though those policies and procedures were only in draft form as *CAC Accounting Policies and Procedures*), but that Friendly Fuld also continued to follow its *Head Start Accounting Principles and Procedures* document. Dwyer Aff. at ¶ 5; see also Knauer Aff. at ¶ 13. However, the new CAC draft policies provide that it is the policy of the organization to give check-signing authority to the following positions: Executive Director, Treasurer, and Chief Financial Officer. ACF Ex. 14, at 7. The *Head Start Accounting Principles and*

Procedures document, on the other hand, states that the Executive Director of the CAC may delegate . . . signing of checks . . . to the CAC Finance Officer" and that the "Board of Directors is responsible for designating signatories for all Agency checks." FF Ex. E, at 2. Since the two documents are inconsistent, we do not see how Friendly Fuld could have both implemented the new policy and kept the old policy in place without generating confusion about what internal controls should be followed. Moreover, while another draft document, called the Friendly Fuld Head Start *Financial Management Agreement Objectives* (which Friendly Fuld gave to the reviewers during the follow-up review) would have authorized the Head Start Director to sign checks, that document was only in draft form and the Treasurer testified he had never seen it. See ACF Ex. 2, at 7; Dwyer Aff. at ¶ 7.

We also note that the draft Friendly Fuld Head Start *Financial Management Agreement Objectives*, ACF Exhibit 2, contains more detailed information on internal controls than either of the other two policy documents. This indicates that whoever drafted these *Financial Management Agreement Objectives* better understood what was required to meet Head Start requirements. Yet, Friendly Fuld provided no testimony about why this document was not reviewed and approved by the Head Start Policy Council and Friendly Fuld Board within the 90-day correction period.

As evidence of Friendly Fuld's continuing failure to adopt or implement adequate internal controls, ACF also relies on its finding that Friendly Fuld could not explain or document its basis for allocating $31,640 in rent and $21,418 for administrative overhead costs to the Head Start grant. Our previous discussion of Friendly Fuld witnesses' failure to adequately explain how these costs were allocated supports ACF's conclusion that Friendly Fuld's allocation practices did not reflect adequate internal controls.

Finally, we note that the Chief Financial Officer's testimony about the mistakes on the interim SF-269 was not entirely credible. He suggests that the mistakes can be explained by the fact that ACF required Friendly Fuld to submit the report early. Rothenberg Aff. at ¶ 7. But the report was dated February 17, 2006 (FF Ex. A, February review report at 27), and the *Head Start Accounting Principles and Procedures* document anticipates preparation of monthly financial reports by the 15th of the following month. FF Ex. E, at 3. Thus, Friendly Fuld should have posted all obligations incurred on or before January 31, 2006, the end of the program year, by the date the SF-269 was submitted (if it had, in fact, implemented those procedures). With respect to the lack of any reporting of non-federal share on the interim SF-269, the Chief Financial Officer attributed this both to the early due date for the report and Friendly Fuld's "practice" of not "posting" the non-federal matching funds until the end of the fiscal year. Rothenberg Aff. at ¶ 9. Yet, the *Head Start Accounting Principles and Procedures* document says that the CAC Finance Department will record on a monthly basis in-kind expenditures (such as volunteer time and donated space) to meet Friendly Fuld's non-federal share requirement. FF Ex. E, at 22-23. The Chief Financial Officer may have been referring to posting of the Abbott Enhancement program funds (which Friendly Fuld witnesses said they used as non-federal share), but the Profit & Loss statement attached to the January 25, 2006 minutes of the Friendly Fuld Board show Abbott Enhancement program revenues and expenses for the period January to December 2005. FF Ex. G, Att. This indicates posting of at least some of the expenses several weeks before the SF-269 was due. In light of this, the fact that the Chief Financial Officer did not report even a tentative figure for non-federal share or an explanation in the remarks section of the SF-269 form indicates, as does other evidence, that the Chief Financial Officer did not fully understand Head Start requirements.

Several Friendly Fuld witnesses did testify that they did not see a need to track non-federal share on an ongoing basis since Friendly Fuld was using the Abbott Enhancement program expenditures to meet its non-federal share and that amount was more than sufficient to meet the 20% non-federal share requirement. Rothenberg Aff. at ¶ 8; Adesanya Aff. at ¶ 10; Tr. at 109, 118. This may have been so, but again raises a question about whether the *Head Start Accounting Principles and Procedures* document accurately reflected internal controls actually applied and further undercuts Friendly Fuld's reliance on that document.

3. *Alleged failure to correct deficiency related to ongoing monitoring (45 C.F.R. § 1304.51(i)(2)*)

Section 1304.51(i)(2) requires that "grantees establish and implement procedures for ongoing monitoring of their . . . Head Start operations . . . to ensure that these operations effectively implement Federal regulations."

The PRISM review report stated:

> The grantee did not have an adequate monitoring system in place to ensure that their Head Start operations were effectively being implemented by the Federal regulations. The grantee utilized a number of procedures and forms in their monitoring efforts,

however it did not provide adequate information on all areas within the program to ensure that the Performance Standards were being met.

The grantee did not have full oversight of their federal funds and funding information of how expenditures were being reported and accounted for in their program. During the review, information could not be found from the C.A.C. financial office on requests for documentation of expenditures charged to Head Start awards. There was no record of C.A.C. administration costs charged to Head Start during Fiscal Year 2004, ending 1/31/05 in the amount of $8,000. There was no documentation available for insurance costs allocated to Head Start or any evidence of follow up regarding the management letter dated 7/30/04 from the auditors. The C.A.C. management contract with Friendly Fuld specified that the C.A.C. CFO was responsible for monitoring financial contract compliance, which was not being effectively carried out. Interviews with the Executive Director and the CFO of C.A.C. and a review of the grantee's financial records confirmed that the monitoring procedures were not in place to properly implement the Federal regulations to operate the Head Start program.

The grantee did not have an effective tracking system for health care services, and for children with disabilities. Child outcomes process had not been established that would yield aggregate data in a form that would assist the grantee in continuous program planning and improvements on tracking the performance of enrolled children based on the 8 domains. Monitoring of enrollment of over-income families did not occur. Monitoring timelines for mandated services did not occur. Mandated fiscal reports were not filed. There was no family and community partnership building process. Governing bodies did not receive the financial reports required and necessary for them to fulfill their responsibilities. Record keeping systems were not in place. There was a lack of clarity regarding roles and responsibilities at the Executive and Board level between Friendly Fuld, Inc. and Community Agencies Corporations (CAC).

The Head Start Director did not provide adequate monitoring of management staff to ensure Head Start Performance Standards were being adhered to. This was

> based on a review of the programs reporting system, minutes of the governing bodies and financial records and interviews with the Executive Director, Head Start Director and management staff.

FF Ex. A, February report, at 25.

The follow-up review report stated:

> The grantee did not establish and implement procedures for the ongoing monitoring of their Head Start fiscal and administrative operations to ensure that these operations effectively implemented Federal regulations. The grantee directly operates Head Start and six other programs as the Friendly Fuld Neighborhood Center, Inc. (FFNC). Friendly Fuld Neighborhood Center, Inc. provides no administration and management support for Head Start and their six other programs. The administrative and management support is provided by Community Agencies Corporation, Inc. (C.A.C.), a separate agency affiliated with and established by Friendly Fuld Neighborhood Center, Inc. and two other non-profit organizations to provide them with a centralized management and control structure. C.A.C. receives the Head Start grant awards, draws down and expenses all grant funds and provides management, human resources, technical and administrative support for all Head Start staff.
>
> Since the grantee's Federal funds are controlled by this related entity (they share two common board officers who are Secretary and Treasurer on both boards and three members at large), the grantee had to implement procedures for the ongoing monitoring of both agencies as it relates to Head Start. Based on observations made, interviews conducted, and records reviewed, there was no monitoring system or plan in place to ensure that Federal regulations were effectively implemented. For example, in the management letter dated July 30, 2004, to the C.A.C. Board Of Directors, the auditors recommended that C.A.C. and its affiliates develop and implement a written financial and operational manual and a written cost allocation plan. The lack of a written financial and operation manual and a cost allocation plan was cited by the triennial review team in April 2005. These documents still were not in place during the follow-up review. The Treasurer for both the C.A.C. and Friendly Fuld Neighborhood Center, Inc. Boards of

Directors stated during an interview that a draft manual had been developed but stated that it was incomplete and had not been implemented. Based on a review of the Friendly Fuld Head Start Profit and Loss Detail report for the period February 2005 through January 2006, $31,640 for a facility shared with two other non-Head Start programs and $21,418 for shared administrative overhead costs were charged to the grant. When asked for documentation to support the shared space and administrative overhead costs charged to the Head Start grant, the CFO stated that C.A.C. did not have a cost allocation plan or any other documentation to support the fact that shared costs were based on relative benefit received.

There was no evidence to indicate that the grantee was monitoring to ensure that contracts were available, signed and dated prior to the disbursement of Federal funds and that fiscal documents were retained as required by 45 CFR 74.53(b)(1). The Service Contract reviewed for the new Fiscal Consultant, dated February 1, 2006, was not signed by either party. Although requested, a signed copy of the Service Contract for the Fiscal Consultant was not provided. The audit management letters for FY 2004 and FY 2003 had to be obtained from the independent auditor because no one at the program could locate them. The copy of the Management Agreement between the grantee and the C.A.C. for the period beginning January 31, 2005, provided during the review was not signed by either party. A signed copy of the Management Agreement was not made available until Friday, February 24, 2006, the last day of the review. The Agreement delivered to the hotel was signed; however, there was no date anywhere on the document indicating when it was initially signed by both parties.

Also, the grantee could not provide documentation regarding the disposition of their high risk designation. A review of the FAAs for the budget period February 1, 2004 — January 31, 2005, indicated that the grantee was on high risk status. The CFO and Head Start Director stated that they did not know if the program was currently on high risk status or not. The CEO, CFO, and Head Start Director could not locate any documentation during the review regarding the disposition of the high risk status.

There was no evidence of a monitoring plan or fiscal oversight by the grantee despite receiving several notices during the period that fiscal operating inefficiencies and inaccuracies were noted. For example, in the management letter dated May 27, 2005, to the C.A.C. Board of Directors, the auditors stated the audit process of Community Agencies Corporation of NJ (C.A.C.) and its Affiliates has been tedious and time consuming because of the high turn over of the Chief Finance Officers (CFO) during the year. The Finance Department was unable to produce from the system trial balance for each individual affiliate, and no audit schedules were provided to the audit team. A review of the interim SF-269 report, dated February 17, 2006, for the twelve month period ended January 31, 2006, was not accurate and complete as required by 45 CFR Part 74.53(b)(1). The report showed no non-Federal match for the entire year, no unliquidated obligations, and an ending balance of $31,000 that the CFO stated was inaccurate. The CFO stated that non-Federal expenditures had not been posted for the budget year. Although the Treasurer for both the C.A.C and Friendly Fuld Neighborhood Center, Inc. Boards of Directors stated during an interview that he was trying to increase the financial expertise on both Boards in order to provide more oversight and monitoring of all fiscal functions, he provided no monitoring plan or specific plan of action to support how or when this would be accomplished.

A monitoring process was documented in other areas of the program. A review of tracking documentation and monthly reports for health care services and disabilities determined that the grantee had an effective tracking system in place. Child Outcomes data was reviewed from the report dated February 17, 2006, and information from the data collected on the eight domains was used for continuous program planning and improvements. Monitoring of over-income families was tracked through a tracking form, selection criteria, and the placement on the waiting list. A review of 16 children's files indicated that there was a family partnership process in place. Governing bodies received monthly financial reports. This was verified by a review of the Board of Directors meeting minutes from November 2005 through January 2006. There was clarification by the Head Start Director regarding roles and responsibilities at the Executive and Board level

> between Friendly Fuld Neighborhood Center, Inc. and Community Agencies Corporation, Inc.
>
> The Head Start Director received monthly reports from program areas and used this information to provide reports of program operations to the Policy Council and the Board of Directors. This was verified by a review of the monthly program reports from November 2005 through January 2006 and a review of the Policy Council minutes and the Board of Directors minutes from November 2005 through January 2006. This was confirmed in interviews with the Head Start Director, the Secretary of the Policy Council and the Treasurer of the Policy Council.

Id. at 26-27.

Friendly Fuld provided evidence that rebutted some of the negative findings regarding financial monitoring in the follow-up review. For example, Friendly Fuld provided testimony that any confusion regarding the high risk status designation was attributable to the fact that ACF had informally lifted the restrictions imposed because of that designation, but had not issued any official notice to that effect. See, e.g., Tr. at 133-137. ACF did not rebut this testimony. Friendly Fuld also provided evidence that undercuts ACF's inference from Friendly Fuld's failure to report non-federal share on the interim SF-269 (submitted before the regulatory deadline) that Friendly Fuld's Board and Policy Council did not have sufficient information on an ongoing basis to monitor whether the non-federal share requirement was being met. Rothenberg Aff. at ¶ 8; Adesanya Aff. at ¶ 10, 12; Tr. at 93-94. For the following reasons, however, we conclude that Friendly Fuld failed to meet its burden to prove that it had fully corrected this deficiency with respect to the fiscal monitoring.

While both Friendly Fuld and CAC had developed new accounting policies and procedures, both documents were still only in draft form at the time of the follow-up review. The Treasurer was not even aware of the document specific to Friendly Fuld's Head Start program. Dwyer Aff. at ¶ 7. Moreover, as our discussion above shows, what Friendly Fuld was in fact doing conflicted in some respects with the *Head Start Accounting Principles and Procedures*, even though that document had never been formally superseded or revised. Friendly Fuld provided no evidence, moreover, to show who was responsible for ensuring that consistent accounting policies were in place and for ensuring that CAC and Friendly Fuld staff knew what policies and procedures they should follow and were in fact following them. While Friendly Fuld provided evidence that its Financial Consultant prepared monthly financial reports that were presented to the Board, the record shows that these reports were based on information provided by the CAC Chief Financial Officer from the general ledger. Rothenberg Aff. at ¶ 5. Friendly Fuld provided no evidence of any system of oversight (by the Financial Consultant or anyone else) to ensure that the information in the general ledger was accurate and consistent with Friendly Fuld policies and procedures. This type of oversight was particularly important because Friendly Fuld had essentially ceded control of its finances to CAC.

While the Treasurer seemed sincere in his efforts to improve the financial integrity of the programs, he was asked to develop a written document that would apply to <u>all</u> CAC agencies, had not at that point compared what he was developing with the *Head Start Accounting Principles and Procedures,* and was not aware of the draft Friendly Fuld *Financial Management Agreement Objectives* at the time of the review. Tr. at 80-85. While it would be important for CAC to be consistent in its financial procedures such as cost allocation, it does not appear that Friendly Fuld had involved the Treasurer in addressing the Head Start deficiencies found in the PRISM review, or, at least, had not made him aware of the 90-day correction period. Moreover, there was no showing that Friendly Fuld had adopted a strategy for monitoring compliance with fiscal performance standards pending its adoption of new policies.

We note also that a report to the Friendly Fuld Board attached to the January 25, 2006 minutes indicates that Friendly Fuld had developed a plan for the deficiencies that had to be corrected by the end of the 90-day period and the minutes indicate that the Board was informed about the anticipated February review. Yet, Friendly Fuld has not submitted that plan. Moreover, the minutes show that, despite the short time remaining for correction, there was no discussion of the plan or of who was responsible for correction of the financial deficiencies, and neither the Treasurer nor the Fiscal Consultant attended the meeting. FF Ex. G.

Moreover, Friendly Fuld's evidence is not sufficient to establish that it had fiscal monitoring procedures to ensure that contracts (such as the fiscal consultant contract and the CAC contract) were adopted by the Board and signed prior to payments being made pursuant to those contracts. Friendly Fuld provided testimony from the former Friendly Fuld Board President saying she believed she signed the Fiscal Consultant contract, but her testimony that she remembered questions about whether the contract hours would be cut back in light of the fact that CAC had just hired a Chief Financial Officer, suggests she was thinking about the earlier contract (since the Chief Financial Officer was hired in January 2005). Tr. at 100. She also testified that "service contracts" were presented to the Board as part of the budget process, and that she believed she signed the service contracts in November or December of 2005. Adesanya Aff. at ¶ 18. The CAC Executive Director stated, "as evidenced by the minutes of the relevant Board meetings," that "all service and management contracts were duly approved and signed before any payment for services were made." Knauer Aff. at ¶ 12. She also stated that she was unaware of any interruption in the Fiscal Consultant's provision of services. Tr. at 131. However, Friendly Fuld provided no documentary evidence, such as Board minutes or copies of signed and dated contracts, to support these statements.

Given that Friendly Fuld was relying on the Fiscal Consultant to provide it information and advice necessary for monitoring the fiscal status of the Head Start program, it was important for the grantee to resolve any questions about his services and to get the contract approved, signed, and into place in a timely manner. In addition, while Friendly Fuld points out (and ACF does not deny) that Friendly Fuld produced a signed copy of the CAC contract by the end of the follow-up review, Friendly Fuld does not deny that the signature on the copy produced was not dated (which suggests that it was signed during the review). In any event, Friendly Fuld did not adequately address the underlying concern about whether it had monitoring <u>procedures in place</u> to make sure that contracts were approved and signed in a timely manner.

Finally, as discussed above, Friendly Fuld could not correlate its expenditures for rent or administration to the written cost allocation plan it said it was following, and its own testimony shows that its only written policies and procedures that had ever been formally adopted had not been revised to reflect the funding relationship between the Head Start program and the two Abbott Programs.

<u>Conclusion</u>

For the reasons stated above, we conclude that Friendly Fuld did not meet its burden to show it fully corrected the deficiencies at issue within the 90 days given for correction. Accordingly, we uphold the termination of Friendly Fuld's Head Start Grant.

Leslie A. Sussan

Constance B. Tobias

Judith A. Ballard
Presiding Board Member

ATTACHMENT TO DAB DECISION NO. 2121

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Friendly Fuld Neighborhood Center, Inc.
Docket No. A-07-79

DATE: June 27, 2007

RULING ON MOTION FOR SUMMARY DISPOSITION

Friendly Fuld Neighborhood Center, Inc. (Friendly Fuld) appealed a determination by the Administration for Children and Families (ACF) to terminate funds for Friendly Fuld's Head Start grant. On appeal, Friendly Fuld moves for summary disposition, arguing that the deficiency findings on which ACF based the termination are invalid because of ACF delays in issuing its initial and follow-up review reports and because ACF improperly conducted its follow-up review prior to the time ACF gave to Friendly Fuld to correct its deficiencies. Friendly Fuld also argues that no hearing is necessary because Friendly Fuld's documentary evidence establishes that it timely corrected the deficiencies.

For the reasons stated below, we deny the motion and conclude that a hearing is necessary.

Legal Background

Head Start is a national program that provides comprehensive child development services. 42 U.S.C. § 9831; 57 Fed. Reg. 46,718 (October 9, 1992). The program serves primarily low-income children, ages three to five, and their families. Id. The Department of Health and Human Services (HHS), through ACF, awards grants to community-based organizations that assume responsibility for delivering Head Start services — including education, nutrition, health, and social services — to their communities. Id.

To ensure that eligible children and their families receive high quality services responsive to their needs, Head Start grantees must comply with the Head Start Program Performance Standards codified in 45 C.F.R. Part 1304. Head Start Performance Standards (final rule), 61 Fed. Reg. 57,186 (Nov. 5, 1996). These performance standards cover the entire range of Head Start services and constitute the minimum requirements that a Head Start grantee must meet in three areas: Early Childhood Development and Health Services; Family and Community Partnerships; and Program Design and Management.

A grantee's noncompliance with a program performance standard or other Head Start requirement constitutes a "deficiency" if it meets one of the definitions of that term in 45 C.F.R. § 1304.3(a)(6). HHS is required to conduct a periodic review of each Head Start grantee at least once every three years. 42 U.S.C. § 9836a(c)(1)(A). If as a result of a review the "responsible HHS official" finds that a grantee has one or more "deficiencies" --

> he or she will notify the grantee **promptly**, in writing, of the finding, identifying the deficiencies to be corrected and, with respect to each identified deficiency, will inform the grantee that it must correct the deficiency **either immediately or pursuant to a Quality Improvement Plan.**

45 C.F.R. § 1304.60(b) (emphasis added).[13]

If the responsible HHS official permits the grantee to correct a deficiency pursuant to a Quality Improvement Plan (QIP), the grantee must submit a QIP that specifies, for each identified deficiency, "the actions that the grantee will take to correct the deficiency and the time frame within which it will be corrected." 45 C.F.R. § 1304.60(c). The QIP must be approved by the responsible HHS official. <u>See</u> 45 C.F.R. § 1304.60(d). The period for correcting deficiencies under an approved QIP may not exceed one year from the date the grantee is notified of them. 42 U.S.C. § 9836A(d)(2)(A); 45 C.F.R. § 1304.60(c).

If a grantee with an approved QIP fails to correct its deficiencies within the time frame specified in the QIP, then ACF may terminate funding. 45 C.F.R. § 1304.60(f); <u>First State Community Action Agency</u>, DAB No. 1877, at 9 (2003). Section 1303.14(b)(4) more generally authorizes ACF to terminate funding if a grantee "has failed to timely correct one or more deficiencies as defined in 45 C.F.R. Part 1304." This is one of

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[13] Section 641A(d)(1)(B)(ii) of the Head Start Act, which was added to the Act on October 27, 1998, several months <u>after</u> section 1304.60(b)'s effective date, gives ACF specific authority to require correction within 90 days without a QIP. <u>See</u> Pub. L. No. 105-285, § 108(d); 61 Fed. Reg. 57,186 (Nov. 5, 1996).

nine grounds for termination set out in section 1303.14(b), which states that "[f]inancial assistance may be terminated for any or all of [these] reasons."

Factual Background

From April 11, 2005 to April 15, 2005, ACF conducted a review of Friendly Fuld's Head Start program, using the Program Review Instrument for Systems Monitoring (PRISM). By letter dated October 28, 2005 (received by Friendly Fuld's Board Chairperson on November 2, 2005), ACF notified Friendly Fuld that it had been designated as a grantee with deficiencies. The letter and the attached report, submitted by Friendly Fuld with its appeal, identified a number of areas of deficiency and prescribed periods of time for correcting the deficiencies in different categories. FF Ex. A, 2d document at 2-4. Specifically, a "Time Frame for Compliance" of 30 days was set out for areas of noncompliance constituting a deficiency listed under heading A, and a "Time Frame for Compliance" of 90 days was set out for areas of noncompliance constituting a deficiency listed under heading B. Id. The letter did not specify a time frame for deficiencies listed under heading C, but had the following statement regarding deficiency category C: "The area(s) of noncompliance constituting this (these) deficiency(ies) must be fully corrected pursuant to the time framees and requirements specified in your approved Quality Improvement Plan (per Sec 641A(d)(1(B)(iii), 42 U.S.C. 9836A(d)(1)(B)(iii))." Id. at 4. The letter further stated:

> If your program continues to have uncorrected deficiencies beyond the specified timeframe(s), pursuant to Sec. 641A(d)(1)(C) of the Head Start Act, 42 U.S.C. 9836A(d)(1)(C), we will initiate proceedings to terminate your Head Start grant.

Id. at 5.

Friendly Fuld timely submitted its QIP. By letter dated December 22, 2005, ACF acknowledged receipt of the QIP and approved the QIP as submitted. FF Ex. B. This letter stated:

> Based on the completion dates for all activities as indicated in the QIP, all deficiencies must be corrected by November 2, 2006.

Id. (first page, unnumbered). The letter also states: "We plan to schedule a follow-up visit at the end of the one year period to determine if all corrections have been made." Id.

ACF had, however, already conducted a follow-up review during the week of December 5, 2005 on those deficiencies identified under heading A and conducted another review on February 21, 2006.

On March 19, 2007, Friendly Fuld received a letter from ACF, with an attached Follow-up Head Start Review Report, informing Friendly Fuld that it had failed to timely correct "the findings determined to constitute deficiencies from the PRISM Monitoring Review conducted in April 2005." FF Ex. A, first document at 1. The letter cited five regulatory requirements as unmet, and referred the grantee to "the enclosed February 2006 Head Start Review Report . . . for a detailed summary of the specific deficiencies that were not timely corrected." Id. at 2. The letter further stated that, pursuant to federal regulations, ACF must issue a letter of termination . . . if a Head Start grantee fails to correct a deficiency" and that "any deficiency that is not timely corrected constitutes a material failure to comply with the terms and conditions of the grant and is a sufficient basis for termination." Id., citing 45 C.F.R. § 1304.60(f).

Analysis

Friendly Fuld moves for summary disposition on several grounds. First, Friendly Fuld argues that ACF's determinations should be set aside because ACF erred in failing to follow regulations regarding the timing of notice to grantees of review findings thereby acting illegally. Second, Friendly Fuld argues that ACF cannot terminate Friendly Fuld's Head Start grant because ACF erred in conducting a follow-up review prior to the established deadline for corrections. Finally, Friendly Fuld argues that ACF erred in concluding that Friendly Fuld had deficiencies that remained uncorrected as of the February 2006 monitoring inspection and has failed to establish an adequate basis for termination.

In reviewing a motion for summary disposition in the nature of summary judgment, the Board has applied a standard similar to that applied in court. Summary judgment is appropriate when there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. Union Township Community Action Organization, DAB No. 1976, at 6. The party moving for summary judgment bears the initial burden of showing the basis for its motion and identifying the portions of the record that it believes demonstrate the absence of a genuine factual dispute. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If a moving party carries its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec.

Industrial Co. v. Zenith Radio, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). To defeat an adequately supported summary judgment motion, the non-moving party may not rely on general denials in its pleadings or briefs, but must furnish evidence of a genuine dispute concerning a material fact--a fact that, if proven, would affect the outcome of the case under governing law. Id. at 586, n.11; Celotex, 477 U.S. at 322. In deciding a summary judgment motion, a tribunal must view the entire record in the light most favorable to the non-moving party, drawing all reasonable inferences from the evidence in that party's favor.

Even if summary disposition might be appropriate, moreover, the Board could still hold a hearing if it decided that presentation of evidence in an evidentiary hearing might aid its decisionmaking. 45 C.F.R. § 16.11.

Here, we conclude that Friendly Fuld has not shown that it should prevail as a matter of law, that ACF has shown that there is a genuine dispute of material fact requiring a hearing, and that, in any event, a hearing would aid the Board's decisionmaking.

ACF's delay in notifying Friendly Fuld of the results of the reviews does not provide a basis for summary disposition in Friendly Fuld's favor.

Friendly Fuld points out that ACF conducted the first PRISM review during the week ending April 15, 2005, but did not issue its report until October 2005, six months later, and that the follow-up report was not issued until March 2007, over a year after the February follow-up review. Friendly Fuld argues that these delays violated section 1304.60(b) of the Head Start regulations, which provides that the responsible HHS official will "notify the grantee promptly, in writing" of any deficiencies found in a review. Friendly Fuld also argues that the delay violated ACF's own PRISM Guide (which Friendly Fuld refers to as an ACF regulation). Friendly Fuld relies on the following statement in the 2004 PRISM Guide (and its accompanying footnote, which we set out after the statement):

> The final Head Start Review Report and accompanying cover letter must be mailed to the Grantee governing body president within 45 calendar days of the end of the on-site review.

The footnote states:

> The Head Start Program Performance Standards require that the grantee be notified "promptly" in writing of any noncompliance or deficiency (see 45 CFR 1304.61(a) and 45 CFR 1304.60(b), respectively). For this reason, delivery of the final Head Start Review Report within 45 calendar days of the end of the on-site phase of the review is imperative.

FF Notice of Appeal, at 6th unnumbered page. Friendly Fuld argues that the federal Administrative Procedure Act (APA) "allows the reviewing court to hold unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and/or without observance of procedure required by law . . . ." Id., citing 5 U.S.C. §§ 706(2)(a) and (d). In Community Action of Laramie County, Inc. v. Bowen, 866 F.2d 347 (10th Cir. 1989), Friendly Fuld asserts, the federal court "made clear that a violation of the Head Start Act or HHS regulations by HHS was reviewable" under the APA. Id.

ACF does not dispute that it failed to notify Friendly Fuld of its deficiencies within 45 days of the end of the triennial review and does not assert that it "promptly" notified Friendly Fuld of the review findings. ACF argues, however, that the 45-day period set forth in the PRISM guidelines is not a regulatory deadline and that, in any event, neither the Head Start Act nor its implementing regulations provide that deficiency findings will be invalidated because of a delay in notice. ACF Br. at 3, citing The Council of the Southern Mountains, DAB No. 2006 (2005). "Equally important," ACF asserts, Friendly Fuld "has not alleged that it was prejudiced in any way by ACF's delay in issuing the notification of results following the triennial review." Id. ACF also asserts that the "Board has held that the requirement in the regulation for prompt notification of review results refers only to notification of deficiencies that must be corrected immediately or pursuant to a QIP, and not the results of follow-up reviews which are conducted after a grantee has already been afforded an opportunity to correct deficiencies." ACF Br. at 3, citing Southern Delaware Center for Children and Families, DAB No. 2073 (2007). Thus, while ACF admits that the delay was "unfortunate," ACF asserts that the delay "does not invalidate ACF's findings." Id.

Certainly, it would have been preferable for ACF to have acted more quickly after each of its reviews. We do not need to decide here, however, whether the six months ACF took to issue the PRISM report can be considered "prompt" under the regulations or whether the 45 days in the PRISM guide is binding on ACF. Even assuming Friendly Fuld is correct that the delay violated regulatory procedures, it does not automatically follow that the delay invalidates ACF's findings, as Friendly Fuld asserts, or would be a basis for a reviewing court to overturn ACF's termination action. The Supreme Court has held that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." United States v. James Daniel Good Real Properties et al., 510 U.S. 43, at 62 (U.S. Hawaii 1993) (refusing to overturn a forfeiture action because government officials failed to comply with certain timing standards of the forfeiture statute), and cases cited therein. In determining whether a failure to comply with a timing provision should result in a judicially-imposed consequence, courts have considered the intent of the body that created the provision and the purpose of the time provision. See Brock v. Pierce County, 476 U.S. 253, 260-62 (1986) (allowing the Secretary of Labor to recover funds in an administrative action even though he failed to issue a decision within 120 days of receipt of a complaint as required by statute). Nor does the APA provide an independent basis for overturning a government action simply because it did not meet a timeliness standard. See Beard v. Glickman, 189 F.Supp.2d 994 (C.D. Cal. 2001).

Friendly Fuld cites to nothing indicating that ACF intended a failure to issue notice of deficiency findings promptly to be a ground for overturning a termination action based on failure to correct those deficiencies. In the context of the review scheme set up by the Head Start Act, the primary purpose of requiring prompt notice of deficiencies is to ensure prompt correction of those deficiencies so that Head Start children and funds are protected and that the children receive the services for which funding is provided. A delay by ACF in issuing a PRISM report does not harm the grantee since the time frame for correcting the deficiencies starts with receipt of the official notification of deficiencies. 45 C.F.R. § 1304.60(c). Indeed, if a grantee becomes aware of any deficiency during the review, ACF's delay actually gives it more time to correct the deficiency.

As ACF points out, moreover, the regulations and PRISM Guide refer to timeliness in issuing a report of a triennial (PRISM) review. Friendly Fuld cites no comparable provision for issuing reports of follow-up reviews. Even if a reviewing court might find that ACF's delay of a year in issuing the follow-up review report was unreasonable and inconsistent with the purpose of the reviews, however, that does not mean that the delay precludes ACF from terminating Friendly Fuld's grant. Nothing in the statute or regulations makes timely issuance of review reports a prerequisite to termination. To the contrary, they both direct that, if ACF finds that a grantee has failed to timely correct its deficiencies, ACF must terminate the grant.

In Southern Delaware, the Board noted that "Southern Delaware did not need to receive formal notice of the findings of a follow-up review in order to have corrected its deficiencies from the earlier review within the time frame specified in its approved QIP." Southern Delaware at 24-25. Similarly here, Friendly Fuld had notice (albeit late) that the PRISM review had found deficiencies that Friendly Fuld had to correct within specified time frames. The lateness of the follow-up review report was not (and could not have been) a factor affecting whether Friendly Fuld was able to correct any deficiencies in a timely manner.

Like Southern Delaware, Friendly Fuld also fails to "allege, much less proffer evidence to substantiate, that it was substantially impaired in its ability to present its appeal of the termination because of ACF's delay in issuing its notice" of termination. Id. Even assuming a termination could be reversed based on a procedural lapse by ACF, a grantee would, at a minimum, have to show that it was prejudiced by that lapse. Yet, here, Friendly Fuld continued to receive Head Start funds during the delay.

In sum, although we consider it important that ACF act promptly on these matters, ACF's delay simply is not a sufficient basis to excuse any failure on the part of Friendly Fuld to correct any deficiencies it had in complying with Head Start requirements. Reading the regulations to require such a result would be inconsistent with their purpose and with the statutory goals of the Head Start Act.

The timing of the follow-up review is not a basis for reversing the termination.

Friendly Fuld also moves for summary disposition based on the timing of the follow-up review. According to Friendly Fuld, ACF may not rely on the findings in the follow-up review (conducted from February 21 through 24, 2006) as a basis for termination since ACF's December 22, 2005 letter approving Friendly Fuld's QIP gave Friendly Fuld until November 2, 2006 to correct all the deficiencies under the QIP.

In response, ACF states that its October 28, 2005 letter identified deficiencies in three categories, indicating that deficiencies under category A were required to be corrected within 30 days, deficiencies under category B were required to be corrected within 90 days, and deficiencies under category C were required to be corrected pursuant to a QIP. ACF admits that there may have been some confusion regarding alleged deficiencies under 45 C.F.R. §§ 1304.51(h)(1) and (h)(2) because these deficiencies were listed under both category B and category C and were included in the QIP. ACF Br. at 4. In its brief, ACF gave notice that it "hereby withdraws as a basis for termination the failure to correct these deficiencies" because of the confusion regarding the time frame that Friendly Fuld was given to correct these deficiencies. Id. ACF argues, and we agree, that ACF's withdrawal renders this issue moot.

While ACF's action in including the deficiencies under 45 C.F.R. §§ 1304.51(h)(1) and (h)(2) in two categories may have been confusing, the October 2005 letter did make it clear that the 90-day time frame for correction applied to the three other deficiencies that were the basis for termination. Moreover, while the language in the December 22, 2005 letter approving the QIP and referring to November 2, 2006 as the deadline for correction could be read as applying to all of the deficiencies addressed in the QIP, it could not reasonably be read to refer to deficiencies that were not addressed in the QIP and clearly had been made subject to a shorter time frame in the prior letter. The lead-in to the statement in the letter that "all deficiencies must be corrected by November 2, 2006" was the phrase "[b]ased on the completion dates for all activities as indicated in the QIP." FF Ex. B. Thus, the statement was referring to the completion dates set in the QIP and all of the deficiencies addressed in the QIP. The December letter does not, however, refer to extending any deadline previously set for corrective actions not in the QIP.

Friendly Fuld alleges that it "is the Appellant's position that no confusion existed on [its] part" regarding the December 22 letter, because Friendly Fuld clearly "was notified by the responsible, authorized person that the deadline was extended to November 2 for all corrections to be completed." FF Supplemental Br. at 4th unnumbered page.[14] However, Friendly Fuld's current position on what the December 22 letter means is irrelevant. Friendly Fuld has not specifically alleged nor proffered any

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[14] Friendly Fuld cites the Board's decision in Norwalk Economic Opportunity Now, DAB No. 2002 (2005) for the proposition that ACF may not terminate a grant for failure to correct deficiencies on a particular date if ACF has extended the time frame for correcting deficiencies beyond that date.

evidence that it was in fact misled by the December 22 letter into thinking that it had until November 2 to correct the three deficiencies on which ACF continues to rely. This is not surprising since it is undisputed that, by early December, ACF had already conducted a follow-up review of the deficiencies that were subject to a 30-day time frame for correction. Thus, by the time Friendly Fuld received the letter approving the QIP, Friendly Fuld should have been aware that ACF was not treating the deficiencies in all categories the same as the deficiencies addressed in the QIP. We also note that there is no evidence that Friendly Fuld had asked that the 90-day time frame for correcting the three deficiencies at issue be extended or that Friendly Fuld objected to the February follow-up review at the time on the basis that it thought it had until November 2 to correct the deficiencies at issue. See ACF Ex. 12 (email from Friendly Fuld's Head Start Director, stating she "will look forward to receiving written confirmation of the dates and expected procedures for the follow-up review" scheduled for February).

Accordingly, we deny summary disposition on this basis. ACF may not further rely on the alleged deficiencies under 45 C.F.R. §§ 1304.51(h)(1) and (h)(2) as a basis for termination of Friendly Fuld's Head Start grant.

Sheila Ann Hegy

Leslie A. Sussan

Judith A. Ballard
Presiding Board Member